No. 17-965

In the Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS

v.

STATE OF HAWAII, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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PARTIES TO THE PROCEEDING

Former Secretary of State Rex W. Tillerson was a defendant-appellant below in this case and a petitioner in this Court. When Deputy Secretary of State John J. Sullivan became the Acting Secretary of State on April 1, 2018, Acting Secretary Sullivan was automatically substituted.

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Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 27, 2017) (Proclamation) is a lawful response to the conclusion of a multi-agency review and recommendation process that certain countries inadequately share information for vetting their nationals or present other risk factors. Based on that recommendation, the President exercised his broad authority to restrict entry of aliens abroad in order to encourage the deficient countries to improve and to protect this Nation until they do.

I. RESPONDENTS' CHALLENGE TO THE PROCLAMATION IS NOT JUSTICIABLE

A. Respondents' Statutory Claims Are Not Justiciable

Respondents contend (Br. 20-26) that their challenge to the Proclamation under the Immigration and Nationality Act (INA) is reviewable like a claim that the Executive has violated domestic law. But this Court made

clear in *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537 (1950), that because aliens have no "claim of right" to enter the United States, and because exclusion of aliens is "a fundamental act of sovereignty" by the political branches, review of an exclusion decision "is not within the province of any court, unless expressly authorized by Congress." *Id.* at 542-543.

Respondents identify no such authorization. To the contrary, when this Court recognized a limited form of review under the Administrative Procedure Act of exclusion orders against aliens physically present in the United States, see *Brownell* v. *Tom We Shung*, 352 U.S. 180 (1956), Congress abrogated it, confining review of removal orders to habeas corpus. Gov't Br. 20. Congress rejected as "fallacious" the notion that excluded aliens have any "'right' to enter this country which [they] may litigate in the courts of the United States against the U.S. government as a defendant." H.R. Rep. No. 1086, 87th Cong., 1st Sess. 33 (1961).

That principle barring review remains entrenched in the INA, which establishes a comprehensive framework for review of orders of removal, but authorizes judicial review only for aliens physically present here. See 8 U.S.C. 1252; Gov't Br. 19-20. Review of the exclusion of an alien abroad—whether challenging a consular officer's decision denying a visa or challenging a statute, regulation, or Executive Order on which such a denial might be based—is foreclosed because Congress has not "sa[id] otherwise." *Saavedra Bruno* v. *Albright*, 197 F.3d 1153, 1159 (D.C. Cir. 1999). Moreover, even when an alien physically present in the United States is ordered removed, only the alien—not third parties—may obtain judicial review. *A fortiori*, third parties cannot challenge the exclusion of aliens who are still abroad.

Respondents alternatively argue (Br. 15) that the nonreviewability rule is limited to "*Congress*'s policy choices or individualized exercises of Executive *discretion*." See Resps. Br. 22-23. But they cite no decision of this Court holding that—notwithstanding the nonreviewability principle—a statutory challenge like theirs is judicially cognizable.[1] And the courts of appeals have rejected such challenges to the exclusion of aliens abroad, even when plaintiffs asserted errors of law. *Centeno* v. *Shultz*, 817 F.2d 1212, 1213 (5th Cir. 1987) (per curiam) (denial of visa "not reviewable" even though alien claimed it "was not authorized by the [INA]"), cert. denied, 484 U.S. 1005 (1988); *De Castro* v. *Fairman*, 164 Fed. Appx. 930, 932 (11th Cir. 2006) (per curiam) (refusing to consider challenge to denial of visa to plaintiff's wife despite allegation that it "constituted legal error" and "a violation of his rights under the INA"). Moreover, respondents' proposed distinctions are contrary to the reasoning of this Court's cases, which have described that nonreviewability principle as grounded in the separation of powers between the "political departments" (plural) and the judiciary. *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977) (citation omitted).

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[1] The plaintiff in *Lloyd Sabaudo Societa Anonima Per Azioni* v. *Elting*, 287 U.S. 329, 332-334 (1932), challenged fines imposed for transporting inadmissible aliens, not an executive order excluding aliens. Cf. Resps. Br. 23. The presidential order challenged in *Dames & Moore* v. *Regan*, 453 U.S. 654 (1981), concerned the treatment of foreign assets in the United States, not the exclusion of aliens abroad. Cf. Resps. Br. 21. *Knauff* involved an alien physically present in the United States who sought habeas corpus. Gov't Br. 22 n.7. The Government has explained why *Sale* v. *Haitian Centers Council, Inc.*, 509 U.S. 155 (1993), is distinguishable. Gov't Br. 22.

If Congress wants to authorize U.S. persons or institutions to raise statutory challenges to the denial of entry to aliens abroad, it of course may do so. But it has not. Respondents' statutory claims are therefore not reviewable—especially given that they challenge the exercise of discretionary power vested by statute directly in the President. See *Dalton* v. *Specter*, 511 U.S. 462, 474, 476-477 (1994).

B. Respondents' Establishment Clause Claim Is Not Justiciable

Respondents do not dispute that they cannot challenge the Proclamation on constitutional grounds except to assert violations of their own constitutional rights. They contend (Br. 26) that their Establishment Clause claim "meets that description." But the Proclamation does not apply to respondents *at all*, and the only persons subject to it—aliens abroad—have no rights under the Clause.

1. Respondents argue (Br. 26-27) that the Establishment Clause is unlike other constitutional provisions—even "other clauses of the First Amendment"—in that it "protects *every* citizen" from a federal establishment of religion. In respondents' view (Br. 27), whenever plaintiffs claim that federal action "establishes a favored or disfavored religion," they have by definition "allege[d] a violation of their *own* right to be free from federal establishments" and may sue if they can show injury in fact. This Court, however, has rejected respondents' premise that Establishment Clause claims are uniquely exempt from ordinary justiciability rules. See *Valley Forge Christian Coll.* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982) (Establishment Clause "establishes a norm of conduct which the Federal Government is bound to honor—to

no greater or lesser extent than any other inscribed in the Constitution"). And "the general rule is that 'a litigant may only assert his own constitutional rights.'" *McGowan* v. *Maryland*, 366 U.S. 420, 429 (1961) (citation omitted).

Respondents do not point to any decision of this Court supporting their theory. They cite (Br. 28-29) *McGowan* and *Two Guys From Harrison-Allentown, Inc.* v. *McGinley*, 366 U.S. 582 (1961). But both involved typical Establishment Clause claims brought by employees and businesses directly regulated by Sunday-closing laws. *McGowan*, 366 U.S. at 430-431; *Two Guys*, 366 U.S. at 583 n.1, 585-586. Although compliance with those laws caused the plaintiffs economic injury, their Establishment Clause rights were implicated because they were coerced into engaging in an allegedly religious practice—observing the Sabbath—by laws allegedly adopted for that religious purpose. Respondents' other cases (Br. 28-29) likewise were brought by plaintiffs directly subject to the regulations at issue. See *Estate of Thornton* v. *Caldor, Inc.*, 472 U.S. 703, 705-711 (1985); *Larkin* v. *Grendel's Den, Inc.*, 459 U.S. 116, 117-127 (1982).[2]

2. Respondents alternatively contend (Br. 29-30) that the Proclamation burdens their own Establishment Clause rights in three ways. First, they argue (Br. 29) that the Proclamation separates the individual respondents from family members abroad and prevents respondent

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[2] Respondents also cite (Br. 27, 29) *Hein* v. *Freedom from Religion Foundation, Inc.*, 551 U.S. 587, 598 (2007) (plurality opinion), and *Arizona Christian Schools Tuition Organization* v. *Winn*, 563 U.S. 125, 145 (2011), but both concerned Article III standing, not whether the challenged conduct violated the plaintiffs' own constitutional rights.

Muslim Association of Hawaii from "welcoming foreigners." But those asserted injuries do not stem from any violation of respondents' own religious-freedom rights. Gov't Br. 27-29. Respondents cite no authority holding that the Establishment Clause confers on U.S. citizens an interest in the entry of aliens abroad. Second, respondents assert (Br. 29) that the Proclamation "denigrat[es] their faith." But the Proclamation does not apply to them, and a plaintiff cannot sue based on an alleged "stigmatizing injury" stemming from purported discrimination against others. *Allen* v. *Wright*, 468 U.S. 737, 755 (1984).

Third, respondents claim that the Proclamation causes them "spiritual" harm akin to "observing a 'benediction' at graduation" or "taking 'offense' at" legislative prayer. Br. 29-30 (brackets and citations omitted). But the cases permitting plaintiffs to assert such "spiritual" injuries concerned unwanted personal exposure to overtly "religious exercises" or displays. *Valley Forge*, 454 U.S. at 487 n.22. Here, the Proclamation says nothing about religion. Respondents' position also would eviscerate *Valley Forge*; on their theory, the plaintiffs there could have sued because the land transfer conveyed a religious message. Gov't Br. 29. Respondents attempt (Br. 30) to distinguish *Valley Forge* and similar cases because they addressed policies "favor[ing]" rather than denigrating particular faiths. See also IRAP Pls. Amici Br. (IRAP Br.) 5-9. That distinction is illogical in the context of a Clause prohibiting religious *establishments*. And it is illusory: virtually any claim that the government has favored one religion could be recast as asserting that the government has denigrated other religions or nonreligion.

II. THE PROCLAMATION IS AUTHORIZED BY THE IMMIGRATION AND NATIONALITY ACT

A. The Proclamation Is Authorized Under 8 U.S.C. 1182(f) And 8 U.S.C. 1185(a)(1)

1. Notwithstanding the broad text of 8 U.S.C. 1182(f) and 1185(a)(1), respondents contend (Br. 30-41, 43-44) that those provisions confer only limited authority on the President to suspend entry temporarily (but not indefinitely) of a discrete group of aliens who share a common characteristic (but not nationality) that makes them dangerous (but is not related to any subject already covered by the INA), and only so long as the suspension is intended to affect the aliens themselves (but not to create diplomatic pressure on their foreign governments). Those atextual limitations cannot be squared with the statutory text or historical practice by past Presidents, and they would diminish the ability of this and future Presidents to use those provisions to protect the United States and conduct foreign affairs.

a. Section 1182(f)'s text confers a "sweeping proclamation power" to suspend entry of aliens based on findings that would not otherwise mandate an alien's inadmissibility under the INA. *Abourezk* v. *Reagan*, 785 F.2d 1043, 1049 n.2 (D.C. Cir. 1986) (R.B. Ginsburg, J.), aff'd by an equally divided Court, 484 U.S. 1 (1987) (per curiam). Every clause of Section 1182(f) uses broad terms that confirm the President's discretion. Gov't Br. 31. Respondents' position that Section 1182(f) entry suspensions can apply only to discrete groups with particular kinds of common characteristics cannot be reconciled with the statute's explicit authorization to suspend entry of "*all* aliens or *any class* of aliens." 8 U.S.C. 1182(f) (emphasis added).

b. Respondents' position is also foreclosed by historical practice. For decades, Presidents have used their authority under Sections 1182(f) and 1185(a)(1) to exclude aliens abroad in order to protect national security and implement foreign-policy objectives. Multiple past Presidents suspended entry not because the covered aliens themselves were particularly dangerous but because their *governments* engaged in conduct that conflicted with U.S. national-security or foreign-policy interests. *E.g.*, Gov't Br. 38 & n.12. Suspending entry of individuals from those countries placed pressure on their governments to change course.

The orders of Presidents Reagan and Carter are directly on point: they responded to diplomatic disputes by broadly suspending entry of nationals from Cuba and Iran, respectively. Gov't Br. 43, 53. Contrary to respondents' assertion (Br. 41) that President Reagan's order was directed against aliens based on their own conduct, he suspended lawful entry "as immigrants" by almost all Cuban nationals in order to apply pressure against the Cuban government. Proclamation No. 5517, 51 Fed. Reg. 30,470 (1986). And President Carter did not limit his suspension to Iranians who planned to "'undertake violent action'" or engage in "'demonstrations' that would lead to 'internal problems and violence,'" Resps. Br. 42 n.13 (brackets and citation omitted); he directed restrictions on all Iranians seeking visas with only very narrow exceptions. See Exec. Order No. 12,172, 44 Fed. Reg. 67,947 (1979), as amended by Exec. Order No. 12,206, 45 Fed. Reg. 24,101 (1980); 4A Op. O.L.C. 133, 140 (1979); Gov't Br. 53. The Proclamation here likewise is explicitly designed to respond to deficiencies in the covered foreign governments by

applying pressure on those governments. See Pet. App. 128a-129a (§ 1(h)(i)).

Respondents also attempt (Br. 41 & n.13) to distinguish the orders of Presidents Reagan and Carter as responses to "exigenc[ies]," but that atextual argument would subject the President's authority to the very sort of national-emergency limitation that Congress considered and rejected when it enacted Section 1182(f) and amended Section 1185(a). See Gov't Br. 32, 42. Respondents' proposed "exigency" standard would also require courts, rather than the President, to determine whether a foreign government's conduct rises to the level of a "special threat" and warrants the sort of nuanced diplomatic "antagoniz[ing]" that Presidents use Section 1182(f) to pursue. *Reno* v. *American-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 491 (1999) (*AAADC*). Courts are "ill equipped" to make those judgments. *Ibid.*

c. Respondents contend (Br. 39) that legislative history supports their proposed limitations on the President's authority because Congress borrowed "nearly verbatim" from preexisting authority when it enacted Section 1182(f). But as previously explained, Gov't Br. 32, Congress significantly expanded the President's authority in the INA by enacting Section 1182(f) without the requirement of a war or national emergency.

d. Respondents only barely attempt (Br. 50) to defend the court of appeals' conclusion that Section 1182(f) prohibits the President from suspending entry without a fixed end point. That interpretation cannot be reconciled with the statutory text, which authorizes the President to suspend entry "for such period as he shall deem necessary." 8 U.S.C. 1182(f). It also would render unlawful virtually every presidential entry suspension issued over the last 40 years, none of which announced

in advance a precise end date. Gov't Br. 41. Instead, the Proclamation, like its predecessors, suspends entry until the covered foreign governments address the identified deficiencies. *Id.* at 40-41; see Pet. App. 142a-144a (§ 4) (directing an ongoing process to engage with foreign governments with deficiencies and evaluate whether to retain the suspensions). As a result of progress made to address the Proclamation's baseline standards, the President recently determined, on the recommendation of the Secretary of Homeland Security, that it is appropriate to remove the restrictions on entry of nationals of Chad. See Proclamation No. 9723, 83 Fed. Reg. 15,937 (Apr. 13, 2018).

e. Respondents are left to argue (Br. 51) that their proposed extra-textual limitations are necessary to prevent Sections 1182(f) and 1185(a)(1) from raising "constitutional concerns." But respondents' interpretations of the INA are not "plausible" and thus cannot justify "ignor[ing] the statutory text." *Jennings* v. *Rodriguez*, 138 S. Ct. 830, 834 (2018). In any event, Sections 1182(f) and 1185(a)(1) raise no serious constitutional concerns. Respondents mischaracterize (Br. 31-32) the government's position as claiming "limitless" authority to rewrite the Nation's immigration laws. The entry-suspension power that Congress conferred on the President in Sections 1182(f) and 1185(a)(1) is indeed broad when it applies, but it applies only to the exclusion of aliens abroad, who have no "claim of right" to be admitted to the United States. *Knauff*, 338 U.S. at 542. Any supposed nondelegation concerns with Sections 1182(f) and 1185(a)(1) in this case are resolved by the fact that the Proclamation is explicitly designed to help implement the INA's goals by ensuring that the United States has the information needed to determine

aliens' admissibility under the INA and protecting the Nation until it does.

Knauff rejected a similar nondelegation objection to Section 1185(a)(1)'s predecessor. See 338 U.S. at 542. Respondents are incorrect (Br. 52-53) that *Knauff* affirmed the Executive Branch's authority merely to create procedural requirements: the alien there was both denied a hearing and "excluded" from the United States "on the ground that her admission would be prejudicial to the interests of the United States." 338 U.S. at 539-540, 542. Respondents also attempt (Br. 52) to distinguish *Knauff* on the ground that the regulation challenged there was adopted during World War II. But the Court's reasoning was not based on that circumstance. Instead, the Court applied the separation-of-powers principle that "[w]hen Congress prescribes a procedure concerning the admissibility of aliens, it is not dealing alone with a legislative power," but also "implementing an inherent executive power" to manage foreign affairs and protect national security. *Knauff*, 338 U.S. at 542.

Respondents argue (Br. 34-35) that this Court has frequently read limitations into broadly worded immigration statutes, but none of their cited cases concerned the exclusion of aliens abroad. They concerned the rights of U.S. citizens or persons already in this country. See, *e.g.*, *Kent* v. *Dulles*, 357 U.S. 116 (1958) (interpreting statute concerning issuance of passports to citizens); *Mahler* v. *Eby*, 264 U.S. 32, 39 (1924) (rejecting nondelegation challenge to "deportation" statute). Relatedly, *Knauff* contradicts respondents' repeated assertion (Br. 4-5, 30, 51-52) that Congress has "exclusive" control over who may be admitted to the United States. See 338 U.S. at 542. The cases they cite emphasized that

Congress's broad power over immigration forecloses attempts by the States to regulate, *e.g.*, *Head Money Cases*, 112 U.S. 580, 591 (1884), or by private parties to bring constitutional challenges in court, *e.g.*, *Fiallo*, 430 U.S. at 796. None suggests that *the President* has no role in regulating who crosses the Nation's borders in order to protect national security and conduct foreign affairs. Cf. *Knauff*, 338 U.S. at 542; Gov't Br. 46.

2. Respondents also attack the reasoning and operation of this particular Proclamation. Their objections are without merit.

a. Respondents' principal objection (Br. 45-50) is a supposed conflict between the Proclamation and various INA provisions, including the grounds of inadmissibility in Section 1182(a), the specified procedures for vetting aliens, and the Visa Waiver Program's (VWP) allowance of travel without a visa for certain short-term visitors from countries that partner closely with the United States. No such conflict exists.

The Proclamation is explicitly designed to *support* a core component of the INA, which requires vetting aliens seeking entry to determine whether they are inadmissible based on criminal history, connections to terrorism, medical conditions, or many other reasons. See 8 U.S.C. 1182(a)(1), (2), and (3); Pet. App. 124a (§ 1(c)). To take just one example, the government may not be able to adequately determine whether a visa applicant has connections to terrorism if the government lacks the information needed to make that determination, including information from the applicant's home country. The President thus found that certain countries' failure to provide needed information prevents the United States from adequately "assess[ing] the risks [their nationals] pose." Pet. App. 128a (§ 1(h)(i)).

It is no answer to say (Resps. Br. 48) that consular officers can simply deny visas in individual cases. Federal law requires a consular officer to provide a basis for refusing a visa, see, *e.g.*, 8 U.S.C. 1182(b)(1)(B), 22 C.F.R. 40.6, 41.121, 42.81, and a central premise of the Proclamation is that, for a small number of countries that fail to provide sufficient information, the United States may not possess facts indicating that an alien is inadmissible or poses a threat. The INA does not require that systemic problem to be addressed in seriatim decisions by individual officers—especially when one of the Proclamation's principal goals is to pressure *foreign governments* to improve their practices.

Respondents insist (Br. 45-47) on a purported conflict between the Proclamation and the VWP. But the VWP is a special exception for aliens traveling on the passports of countries with which the United States has unusually strong relationships; it does not address the adequacy of vetting nationals from some countries that pose a particularly high risk. VWP countries are "many of America's closest allies" and provide an extraordinary amount of information to the United States to assist in vetting their nationals: VWP eligibility requires (among other things) a foreign government to permit a comprehensive evaluation of its "counterterrorism, law enforcement, immigration enforcement, passport security, and border management capabilities," often including "operational site inspections of airports, seaports, land borders, and passport production and issuance facilities."[3] Determining VWP eligibility thus does not remotely involve "*precisely* the same" factors (Resps. Br. 46) as the Proclamation's baseline criteria. More importantly,

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[3] U.S. Dep't of Homeland Sec., *U.S. Visa Waiver Program*, https://www.dhs.gov/visa-waiver-program.

in enacting and amending the VWP, Congress never attempted to determine—as the multi-agency review process did—whether the specified countries' information sharing is so deficient that "the United States Government lacks sufficient information to assess the risks [nationals from those countries] pose to the United States." Pet. App. 128a (§ 1(h)(i)).

Respondents' citations (Br. 47-50) of other INA provisions likewise show no conflict. They note, for example, that Congress has mandated a consular-officer interview for nonimmigrant visa applicants who are "identified as a member of a group or sector that the Secretary of State determines * * * poses a substantial risk of submitting inaccurate information in order to obtain a visa." 8 U.S.C. 1202(h)(2)(F)(i). But Congress's identification of particular visa applicants who should receive additional scrutiny does not address whether the United States is receiving adequate information to vet nationals of every other country. Nor does it suggest that Congress disabled the President from invoking the flexible authority in Sections 1182(f) and 1185(a)(1) upon discovery that, due to a lack of information from particular countries or other risk factors, current vetting procedures *are* inadequate. See *Abourezk*, 785 F.2d at 1049 n.2 (Section 1182(f) enables the President to supplement INA's other grounds of inadmissibility). Congress expressly granted the President the authority to respond to the innumerable conditions that might impact the vetting system or other "interests of the United States." 8 U.S.C. 1182(f).

Respondents' argument, at bottom, is that the President may never use Sections 1182(f) and 1185(a)(1) to address national-security and foreign-relations concerns that are related to existing provisions of the INA.

That would render those provisions virtual nullities, because almost any consideration could be said to be related to something in the INA. As even respondents acknowledge (Br. 40-41), past Presidents have suspended entry of aliens who shared a characteristic of the sort addressed somewhere in the INA, even though the covered aliens were not already inadmissible. Respondents' interpretation is not faithful to the sweeping power that Congress granted the President in Sections 1182(f) and 1185(a)(1) to carry out his constitutional and statutory responsibilities.

b. Respondents further argue (Br. 31) that the Proclamation is impermissibly based on nationality *alone*, and that the President's explanations for his findings are a sham. Section 1182(f) does not categorically foreclose consideration of nationality, as the orders of Presidents Reagan and Carter show. The text grants broad authority to suspend entry of "any class" of aliens where the President finds that their entry would be contrary to the "interests of the United States." 8 U.S.C. 1182(f). Multiple other provisions of federal immigration law similarly depend in part on aliens' nationality. See, *e.g.*, 8 U.S.C. 1253(d) (directing State Department to deny visas to "nationals" of a foreign government that unreasonably delays accepting its nationals); 8 U.S.C. 1187(a)(12)(A)(i) and (ii) (Supp. IV 2016) (excluding dual nationals of Iraq or Syria from the VWP).

The President's national-interest determination here was based on his findings regarding the failure of select foreign governments to provide this Nation's government with information needed to keep this country safe. The worldwide, multi-agency review revealed that some foreign governments do not adequately share

information or have other risk factors, and the President concluded that tailored entry restrictions will both incentivize the deficient countries to improve and protect this country until they do. Pet. App. 128a (§ 1(h)(i)).

Respondents contend (Br. 43) that the Proclamation's objective of obtaining more complete information to vet foreign nationals is spurious, because the Proclamation permits some aliens from the covered countries to travel to the United States on nonimmigrant visas. But as the Proclamation explains, the President sought to balance multiple objectives, including protecting national security by denying entry to persons about whom the United States lacks sufficient information *and* motivating other countries to provide needed information and address other risks, as well as "foreign policy, national security, and counterterrorism objectives" in each country. Pet. App. 130a (§ 1(h)(iii)); see *id.* at 128a-129a (§ 1(h)(i) and (ii)). The Proclamation recognizes that not all categories of foreign travelers and not all foreign governments are alike with respect to these objectives. See *id.* at 128a-137a (§§ 1(h)(i)-(iii), 2). The President also considered "mitigating factors, such as a willingness to cooperate or play a substantial role in combatting terrorism." *Id.* at 130a (§ 1(h)(iii)). The President then tailored the Proclamation's restrictions in ways that he determined would most likely motivate foreign governments to improve while protecting the United States in the interim. See *id.* at 128a-130a (§ 1(h)(i)-(iii)).

c. Finally, respondents criticize (Br. 42) the Proclamation's restrictions as "overbroad." But they cite no case suggesting that Section 1182(f)—a sweeping provision vesting authority in the President to exclude persons who have no right to be admitted to this country—is

subject to a narrow-tailoring requirement. Cf. Br. in Opp. 27 (conceding that Proclamation need only have a rational basis). In any event, the Proclamation explains that the problems identified by the worldwide review concerned actions of foreign governments, so the entry suspensions are directed against nationals of those countries. Pet. App. 123a-133a (§ 1). The Proclamation also includes exceptions and a waiver process in order to admit aliens whose exclusion would not be in the interests of the United States. See *id.* at 137a-142a (§ 3). Between December 8, 2017 (when the Proclamation went into full effect) and April 1, 2018, the State Department cleared more than 430 applicants for waivers, many of whom have already received visas.[4]

B. The Proclamation Does Not Violate 8 U.S.C. 1152(a)(1)(A)

Section 1152(a)(1)(A) prohibits discrimination in the issuance of immigrant visas to aliens who are otherwise admissible to enter the United States. Respondents instead treat that provision (Br. 54-57) as a constraint on the President's power to deny entry (and thus visas) to aliens that he determines should be inadmissible in the first place under Sections 1182(f) and 1185(a)(1). Respondents' interpretation is completely untethered from the statutory text and historical practice. See Gov't Br. 48-55.

1. Section 1182—including Section 1182(f)—addresses which aliens are "inadmissible" to the United States (and thus ineligible to receive a visa to enter the United

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[4] Bureau of Consular Affairs, U.S. Dep't of State, *December 4, 2017—Court Order on Presidential Proclamation*, https://goo.gl/JH526i. Respondents cite (Br. 20) outdated figures regarding the number of waivers granted in the first months of the Proclamation's effect when the State Department was initiating the waiver-evaluation process.

States), whereas Section 1152 concerns the "issuance of an immigrant visa" to an admissible alien. 8 U.S.C. 1152(a)(1)(A). Respondents have no answer to the multiple textual features showing that Section 1152(a)(1)(A) and Sections 1182(f) and 1185(a)(1) operate in different spheres. Congress would not have limited Section 1152(a)(1)(A) to "issuance of an immigrant visa"—a function typically performed by consular officers, see 8 U.S.C. 1201(a)—if it had meant to limit the *President's* authority. Congress also would not have focused Section 1152(a)(1)(A) on "visa[s]" if it had meant to constrain the power to determine who may *enter*. Respondents say (Br. 55) that "the only purpose of a visa is to enable entry," but the INA itself separates receipt of a visa from permission to enter the United States and makes clear that a visa does not entitle an alien to enter if he is inadmissible, including under Section 1182(f). See 8 U.S.C. 1201(h). And respondents do not attempt to explain why Congress would have limited Section 1152(a)(1)(A) to "immigrant visa[s]" when Section 1182(f) allows the President to exclude "immigrants or nonimmigrants."

Respondents argue (Br. 54) that Section 1152(a)(1)(A) does not "exempt" aliens who are inadmissible under Section 1182. That is mistaken. If an alien is inadmissible to the United States under Section 1182 (or any other provision), then a consular officer will not issue a visa to that alien, see 8 U.S.C. 1201(g), and Section 1152(a)(1)(A) will never come into play. And even if the alien did receive a visa, Section 1152(a)(1)(A) would have no impact on the government's subsequent deci-

sion to deny entry of that alien pursuant to the Proclamation, per 8 U.S.C. 1201(h).[5] Section 1152(a)(1)(A) thus bars discrimination against immigrant-visa applicants who are eligible to receive a visa, but it does not disturb the grounds of inadmissibility in Section 1182, including Section 1182(f), or the President's authority to make reasonable rules regarding entry in Section 1185(a)(1). This reading of the provisions is confirmed by the orders of Presidents Reagan and Carter, both of which suspended entry based on nationality, and neither of which respondents contend violated Section 1152(a)(1)(A). See Resps. Br. 60-61.

Respondents argue (Br. 56-57) that the government's view would permit the President to reenact the former national-origins quota system. That is incorrect, as the government has already explained. See Gov't Br. 52. The explicit purpose of Congress's 1965 amendments was to repeal the quota system and replace it with one based on family and work relationships. Act of Oct. 3, 1965, Pub. L. No. 89-236, § 1, 79 Stat. 911 (amending INA § 201(e), 66 Stat. 176). As a result, the President could not use Section 1182(f) to countermand that explicit judgment. But the Proclamation does no such thing; it *implements* the INA by ensuring that the United States has the information needed to determine admissibility.

2. The few listed exceptions to Section 1152(a)(1)(A) do not support respondents' contention that the President may never consider nationality when suspending

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[5] Even if Section 1182(f) were read to empower the President to do nothing more than suspend entry, 8 U.S.C. 1185(a)(1) would authorize the President to take the further "reasonable" step of denying visas to the covered aliens, in accordance with the policies in 8 U.S.C. 1201(g) and (h).

entry under Sections 1182(f) and 1185(a)(1). First, there is no conflict between the latter provisions and Section 1152(a)(1)(A), and so no exception is needed. Second, the INA shows that the exceptions to Section 1152(a)(1)(A)—which are for contemporaneously amended provisions—are not exclusive. Gov't Br. 56-57. For example, 8 U.S.C. 1253(d) directs the State Department to "discontinue granting immigrant visas or nonimmigrant visas, or both, to citizens, subjects, nationals, and residents of [a] country" whose government refuses to accept its nationals. Respondents say (Br. 59 n.18) that Section 1253(d) refers only to issuance of visas by consular officers "in th[e] foreign country" involved. But the fact remains that the statute expressly mandates denying visas to certain aliens based on nationality, and respondents cannot reconcile that mandate with their interpretation of Section 1152(a)(1)(A).

3. Respondents lack any textual response to the severe constitutional concerns their interpretation would raise. On their interpretation of Section 1152(a)(1)(A), the orders of Presidents Reagan and Carter were unlawful, and the President would not have the authority to suspend entry from a single country if he learned that an unidentified national from that country was attempting to enter for terrorism purposes (say, to carry a dirty bomb into the United States). Respondents disclaim that result and argue (Br. 60-61) that the Court should create an exception to Section 1152(a)(1)(A) for presidential actions that are "closely drawn" to address "specific fast-breaking exigencies." But the absence of any such textual exception shows that Congress did not intend Section 1152(a)(1)(A) to limit the President's flexible entry-suspension authority under Sections 1182(f) and 1185(a)(1).

It is also doubtful that either President Reagan's Cuba order or President Carter's Iran order would survive respondents' closely-drawn-to-a-compelling-exigency test. For instance, President Reagan gave as one reason for the suspension the Cuban government's decision to suspend an immigration agreement 15 months earlier. Gov't Br. 43. A court also might not view that order as narrowly tailored because it applied pressure on the Cuban government by excluding almost all Cuban nationals as immigrants, not merely those who had themselves engaged in wrongdoing. Nor is the judiciary even institutionally equipped to determine when a national-security or foreign-policy dispute qualifies as sufficiently "'compelling,'" "fast-breaking," or "exigen[t]" to warrant making an exception to a federal statute. Resps. Br. 60 (citation omitted); see *AAADC*, 525 U.S. at 491.

Contrary to respondents' argument (Br. 60), the constitutional difficulties with their interpretation of Section 1152(a)(1)(A) are not abated by 50 U.S.C. 21. That provision applies only during "a declared war" with a particular "foreign nation or government" or when a foreign government or nation threatens an "invasion or predatory incursion * * * against the territory of the United States," and it permits only the "apprehen[sion] * * * and remov[al]" of nationals of that government who are "within the United States." Thus, 50 U.S.C. 21 provides no basis for defending the Nation's border from terrorist threats. It is utterly implausible that Congress would have attempted to use Section 1152(a)(1)(A) to deprive the President of his constitutional and statutory power to protect this country by denying entry to aliens abroad who potentially would do it harm.

III. THE PROCLAMATION DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

A. The Proclamation Is Constitutional Under *Mandel* And *Din*

1. Respondents contend (Br. 61-65) that *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972), is inapplicable to broad policies regarding entry of aliens adopted by the Executive and that domestic case law governing local religious displays and school prayer applies instead. But the Court first applied *Mandel*'s test to an action by the Executive, see *id.* at 770, and later extended it to a broad policy adopted by Congress, see *Fiallo*, 430 U.S. at 792-796. As lower courts have recognized, *Mandel* applies equally to broad Executive policies. See, *e.g.*, *Rajah* v. *Mukasey*, 544 F.3d 427, 433, 438 (2d Cir. 2007) (National Security Entry-Exit Registration System adopted after September 11, 2001); see also *Washington* v. *Trump*, 858 F.3d 1168, 1181-1182 (9th Cir. 2017) (Bybee, J., dissenting from denial of reconsideration en banc) (collecting cases). This reflects the fact that the exclusion of aliens is a fundamental act of sovereignty committed to the "political departments." *Fiallo*, 430 U.S. at 792 (citation omitted). It would invert the constitutional structure to "give deference to a consular officer making an individual determination, but not the President when making a broad, national security-based decision." *Washington*, 858 F.3d at 1179 (Bybee, J., dissenting from denial of reconsideration en banc).

Respondents' assertion that *Mandel* applies only when the Executive is "carrying out 'specific statutory directions,'" Br. 63 (citation omitted), is also incorrect. *Mandel*'s rule is premised on the power and discretion that the Constitution and Congress vest in the Executive to suspend or restrict entry of aliens. See 408 U.S.

at 765-767. *Mandel* itself concerned not rote implementation of statutory directives, but the Attorney General's decision not to "exercise [his] discretion" to *waive* Mandel's inadmissibility. *Id.* at 759; see *id.* at 767-770; see also *Kerry* v. *Din*, 135 S. Ct. 2128, 2141 (2015) (Kennedy, J., concurring in the judgment) (waiver provision in *Mandel* "granted the Attorney General nearly unbridled discretion").

Respondents argue (Br. 64) that *Mandel* is inapplicable to claims of unlawful purpose or pretext. But in *Mandel* the Court rejected Justice Marshall's charge in dissent that "the Attorney General's reason for refusing a waiver" was belied by prior statements of the Department of State and was therefore "a sham" motivated to deprive Mandel of the opportunity to speak to an American audience. 408 U.S. at 778; see *id.* at 770 (majority opinion). Respondents' related argument (Br. 64) that *Mandel* is incompatible with the Establishment Clause "reasonable observer" standard assumes its own conclusion. Where *Mandel* applies, its rational-basis test displaces rules that courts might apply in domestic contexts.

2. Respondents contend (Br. 65-67) that *Mandel* and *Din* permit probing the sincerity of the Executive's stated justifications for suspending or restricting entry. That cannot be squared with what *Mandel* said or did: the majority refused to "look behind" the "facially legitimate and bona fide reason" the Attorney General gave. 408 U.S. at 770. It is also irreconcilable with the nature of "rational-basis review." *Sessions* v. *Morales-Santana*, 137 S. Ct. 1678, 1693 (2017); *United States R.R. Ret. Bd.* v. *Fritz*, 449 U.S. 166, 179 (1980) (Once a court finds that "there are plausible reasons for" the challenged action, the "inquiry is at an end."). Rational-basis review is especially appropriate for decisions excluding aliens

abroad, where litigants should not be able to challenge whether the Executive has "disclose[d] its 'real' reasons for deeming nationals of a particular country a special threat"—reasons "a court would be ill equipped" to evaluate in any event. *AAADC*, 525 U.S. at 491.

Respondents mistakenly read (Br. 65-67) the concurrence in *Din* as abandoning rather than applying *Mandel*'s test. The *Din* concurrence discussed whether *Mandel*'s "'facially legitimate and bona fide'" standard was satisfied by the consular officer's stated (but unexplained) reason for denying a visa and found that the officer had "relied upon a bona fide factual basis" for invoking the cited ground of inadmissibility. 135 S. Ct. at 2140 (citation omitted). The concurrence merely posited that if the plaintiff had "plausibly alleged with sufficient particularity" that the consular officer lacked a bona fide factual basis for invoking that provision, *id.* at 2141, she might have been entitled to "additional * * * details" specifying "the facts underlying" the consular officer's unexplained "determination," *id.* at 2140-2141, provided the facts were unclassified. But where the exclusion *is* supported by an objectively reasonable factual basis, the inquiry is over. Here, the Proclamation sets forth ample factual bases for the President's determinations, which respondents have not meaningfully challenged. Nothing in the *Din* concurrence suggests that a court may look behind the President's factual determination in search of pretext, directly contrary to *Mandel*.

B. The Proclamation Is Constitutional Under Domestic Establishment Clause Precedent

1. Respondents ask the Court (Br. 69) to ignore the Proclamation's explicit purpose and religion-neutral terms and to infer an unstated religious aim from "[t]he

history and circumstances surrounding [its] enactment." See Resps. Br. 68-71. But even plaintiffs challenging a domestic policy that has explicitly religious content (such as a Ten Commandments display) must overcome "deference" owed to the government's stated secular reasons and show that the stated objective was a "sham"—a "secondary" pretext to a primarily religious aim. *McCreary County* v. *ACLU of Ky.*, 545 U.S. 844, 864 (2005). After all, the Establishment Clause is concerned only with "official purpose," not unofficial or "secret motive[s]." *Id.* at 862-863. Plaintiffs who seek to impute an improper religious aim to facially religion-*neutral* policies necessarily bear an even heavier burden. And respondents' burden here is heavier still because, in issuing the Proclamation, the President acted at the apex of his authority to safeguard national security—"an urgent objective of the highest order," *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 28 (2010)—and to "control the foreign affairs of the nation," *Knauff*, 338 U.S. at 542.

Respondents offer no valid reason to impugn the country-specific findings in the Proclamation; the worldwide, multi-agency review that led to those findings, and the presumption of regularity that attaches to them; or the good faith of the multiple Cabinet-level officials who participated in the review and recommendation process. Cf. Gov't Br. 68-69. Respondents assert (Br. 73) that the review was "dictated by" Executive Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 9, 2017) (EO-2). But EO-2 left it to the Acting Secretary of Homeland Security to identify "whether, and if so what, additional information" was required from each country and to evaluate each country's information sharing and other risk factors on that basis. Pet. App. 157a-159a (§ 2(a), (b), and

(e)). Respondents also assert (Br. 73) that a "disparity" between the review's criteria and the Proclamation's restrictions "suggest[s]" that the results were "foreordained," citing the restrictions imposed on Somalia. The Proclamation explains why the President found those restrictions were necessary for religion-neutral reasons, Gov't Br. 69-70, and respondents offer nothing to refute that explanation.[6]

Respondents also argue that the Proclamation is a "religious gerrymander." Br. 71 (quoting *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 534 (1993) (*Lukumi*)). They do not come close to showing that its restrictions are equivalent to the ordinance in *Lukumi* that had been carefully crafted to target "the religious exercise of Santeria church members" and virtually no one else. 508 U.S. at 535; see *id.* at 534-540. Respondents note (Br. 71) that most of the countries covered by the Proclamation have Muslim-majority populations. But that fact alone cannot support an inference of religious animus given that most of those Muslim-majority countries (and all of those covered by EO-2) were previously identified by Congress or the Executive as presenting heightened national-security concerns. Gov't Br. 3-5, 66. Respondents' conjecture that the Proclamation was designed to prevent

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[6] Respondents' amici contend that the presumption of regularity is merely a "working principle" irrelevant to the standard of proof. Former Exec. Branch Officials Amici Br. 14 (citation omitted). But this Court has made clear that, "[h]owever the rule is characterized, where the presumption is applicable, clear evidence is usually required to displace it," *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 174 (2004), and that it applies with particular force in this setting, see *AAADC*, 525 U.S. at 490-491.

entry by Muslims also cannot explain the Proclamation's addition of two non-Muslim-majority countries; its omission of two (since expanded to three) previously covered Muslim-majority countries; its omission of all other countries (including the vast majority of Muslim-majority countries) that met the review's baseline criteria; its application within all covered countries without regard to religion; or its significant exceptions for various categories of aliens from Muslim-majority countries. *Id.* at 63-65; see *McGowan*, 366 U.S. at 445.

2. In any event, respondents' argument fails on its own terms. They rely (Br. 69-71) on both pre-inauguration campaign-trail statements by then-candidate Donald Trump and others—which even the Fourth Circuit declined to consider, see *IRAP* v. *Trump*, 883 F.3d 233, 266 (2018) (en banc), petition for cert. pending, No. 17-1194 (filed Feb. 23, 2018)—and post-inauguration remarks. See also IRAP Br. 10-17. As the government has explained, those statements do not show that the Proclamation rests on religious bias; indeed, they do not address the meaning of the Proclamation at all. Gov't Br. 66-68, 71. For example, respondents quote a remark by the President after EO-2 was enjoined calling for a "far larger, tougher and more specific" suspension. Resps. Br. 70 (citation omitted). That comment says nothing about religion, and the Proclamation is in fact narrower than EO-2 in many respects. Gov't Br. 71.

Respondents also rely on more recent statements by the President and aides. For instance, they claim that the President has retweeted links to "anti-Muslim propaganda videos," and they cite a deputy press secretary's remark addressing questions about those messages that "the 'President has been talking about these security issues for years now.'" Resps. Br. 70 (citation omitted).

But the President's retweets do not address the meaning of the Proclamation at all. And when asked directly whether "the President think[s] that Muslims are a threat to the United States," the deputy press secretary answered, "No," and explained that the President's focus has been national security, not religion.[7] Respondents also ignore the President's many statements disclaiming religious animus and praising Islam.[8] If the

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[7] The White House, *Press Gaggle by Principal Deputy Press Secretary Raj Shah en route, St. Louis, MO* (Nov. 29, 2017), https://www.whitehouse.gov/briefings-statements/press-gaggle-principal-deputy-press-secretary-raj-shah-112917/.

[8] For instance, the President has stated that EO-2's predecessor was "not a Muslim ban," The White House, *President Donald J. Trump Statement Regarding Recent Executive Order Concerning Extreme Vetting* (Jan. 29, 2017), https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-statement-regarding-recent-executive-order-concerning-extreme-vetting/, but was focused on "countries that have tremendous terror." *Transcript: ABC News anchor David Muir interviews President Trump*, ABC News, Jan. 25, 2017, http://abcnews.go.com/Politics/transcript-abc-news-anchor-david-muir-interviews-president/story?id=45047602. And EO-2 expressly disclaimed any purpose of "discriminating for or against members of any particular religion." Pet. App. 151a (§ 1(b)(iv)). The President also has praised Islam as "one of the world's great faiths" and emphasized that the fight against terrorism "is not a battle between different faiths, different sects, or different civilizations." Washington Post Staff, *President Trump's full speech from Saudi Arabia on global terrorism*, Wash. Post, May 21, 2017, https://goo.gl/viJRg2. He has since "reiterate[d] [that] message." The White House, *Statement from President Donald J. Trump on Ramadan* (May 26, 2017), https://www.whitehouse.gov/briefings-statements/statement-president-donald-j-trump-ramadan/. He has expressed this Nation's "deep[] commit[ment] to the right of religious believers everywhere to be free from persecution" and "called on [foreign] leaders to protect Muslims, and Christians, and Jews, and people of all faiths." The White House, *Remarks by President Trump at the Faith and Freedom Coalition's Road to Majority*

Court considers extrinsic matter at all, it should not invalidate a formal national-security and foreign-relations directive of the President based on respondents' one-sided account.

The harm caused by accepting respondents' contrary position that past statements by the President and others taint this Proclamation would not be confined to this case. It also "w[ould] leave the President and his administration in an untenable position for future action." *IRAP*, 883 F.3d at 374 (Niemeyer, J., dissenting). "It is undeniable that" the President "will continue to need to engage in foreign policy regarding majority-Muslim nations, including those designated in the Proclamation." *Ibid.* Respondents' view threatens to impede the President from conducting the foreign affairs of the Nation in this area. This Court should reject their rule that would hamstring the head of a coordinate branch in addressing matters the Constitution entrusts to the Executive.

IV. THE GLOBAL INJUNCTION IS VASTLY OVERBROAD

Respondents fail to justify the preliminary injunction's global application to nonparty aliens abroad. Cf. Gov't Br. 72-76. They do not dispute that injunctive relief cannot properly go beyond providing "complete relief to the plaintiffs." Resps. Br. 77 (citation omitted). Respondents offer no valid reason why a worldwide injunction is needed to do so here. They assert (*ibid.*) that their legal challenge to the Proclamation is "facial,"

Conference (June 8, 2017), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-faith-freedom-coalitions-road-majority-conference/. And the President has "condemn[ed] * * * violence against people of faith," including Muslims. Proclamation No. 9690, 83 Fed. Reg. 3057 (Jan. 22, 2018).

but that conflates the *reason* they claim the Proclamation is unlawful with the proper *remedy*.[9] Respondents' claimed harms from separation from family members (*ibid.*) would be fully redressed by plaintiff-specific relief. The State and Association argue (*ibid.*) that they cannot "identify" today which aliens will seek to "join or visit their institutions" in the future. That is simply an admission that their purported injuries are speculative. In any event, a narrower injunction could apply to future aliens they identify.

Respondents also do not dispute that injunctive relief is limited to that historically available at equity. Cf. Gov't Br. 72-73. Respondents analogize absent-party injunctions to "bills of peace." Br. 79 (brackets and citation omitted). But "[t]he analogy is not close." Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417, 426 (2017). A bill of peace was "a kind of proto-class action" that resolved claims among a "small and cohesive" group, binding only those persons; it "would not control the defendant's conduct against the world." *Ibid.*

Respondents also fail to justify the illogical results of their approach. A categorical injunction binds the government in all future disputes—thus typically cutting off further litigation in other fora—but a decision denying relief will not bind other plaintiffs, even if the first court rules that the government's position on the merits is cor-

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[9] Respondents' cases (Br. 77) are inapposite. They addressed (at most) the proper scope of the claims on the merits, not the proper scope of relief to be entered after that claim was upheld. See *Utility Air Regulatory Grp.* v. *EPA*, 134 S. Ct. 2427, 2449 (2014); *Santa Fe Indep. Sch. Dist.* v. *Doe*, 530 U.S. 290, 314-317 (2000); *Sullivan* v. *Zebley*, 493 U.S. 521, 536 n.18 (1990).

rect. Gov't Br. 75-76. This Court should reject the troubling but increasingly prevalent practice of legislation-by-injunction and hold that any relief must be limited to redressing cognizable, irreparable injuries to the parties.

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

APRIL 2018